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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-248

UNITED STATES GYPSUM COMPANY,
*Petitioner and Defendant-Appellee-Cross-Appellant Below,*

*vs.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
*Respondent and Plaintiff-Appellant-Cross-Appellee Below.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Petitioner, United States Gypsum Company, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Fifth Circuit entered in the above entitled cause on April 11, 1974.

### OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Alabama is reported at 339 F. Supp. 302. It is printed in separate Appendix C hereto, pp. A40-A41. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 492 F. 2d 713. It is printed in separate

Appendix A hereto, pp. A1-A37. The per curiam statement denying the petition for rehearing has not as yet been officially reported. It is printed in separate Appendix B hereto, pp. A38-A39.

## JURISDICTION.

The judgment of the Court of Appeals was entered on April 11, 1974. A timely petition for rehearing was denied on July 31, 1974. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

Pursuant to a judgment in a § 301(a) action (29 U. S. C. § 185(a)) an arbitration was held between a union and a new employer under the outstanding collective bargaining agreement negotiated with the predecessor employer which the new employer neither agreed to nor assumed. Underlying each of the questions here presented is the decision of the Court of Appeals that the arbitrator could as a matter of law hold that the new employer was bound by certain provisions of said agreement. Those questions are:

1. Whether in such an arbitration a new employer, who purchased the assets of a plant of the predecessor employer with specified exceptions including the outstanding collective bargaining agreement negotiated with the predecessor employer and shortly thereafter employed all but three of the predecessor's employees in the same bargaining unit, is bound to honor the check off and reopener provisions of said agreement?

2. Whether in such an arbitration the arbitrator's award that the new employer pay to the union, without right of recoupment from wages of employees, the amount of union dues that might have been checked off to the date of the union's decertification if the new employer had honored the dues check off provision of said collective bargaining agreement and also the

check off authorizations previously given to the predecessor employer by the employees who subsequently became employees of the new employer, is valid?

3. Whether in such an arbitration the arbitrator's award of a wage increase to all employees of the new employer under a provision in the collective bargaining agreement providing that the contract might be reopened mid-term for negotiation of a wage increase by service of a specified notice, is valid under the following circumstances: (a) the union requested that the collective bargaining agreement be extended by the arbitrator for an additional period commensurate with that during which it was rendered ineffective because of the refusal of the new employer to honor said contract; (b) no evidence of the service of a notice to reopen the contract was presented to the arbitrator; (c) neither party to the arbitration requested an award of a wage increase or presented any evidence or argument to the arbitrator relative to a wage increase that might have been negotiated; and (d) the arbitrator's award was in an amount found by the arbitrator on his own research without affording the parties to the arbitration a hearing relative to such wage increase?

**CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.**

This case involves Amendment V to the Constitution of the United States and the following sections of the Labor Management Relations Act, 1947, as amended: §§ 8(a)(2), (5) and (d); 9(a) and (c)(1)(B); 10; 203(a) and (d); 301 and 302(a), (b)(1), (c) and (d). (29 U. S. C. §§ 158(a)(2), (5) and (d); 159(a) and (c)(1)(B); 160, 173(a) and (d); 185 and 186(a), (b)(1), (c) and (d)). The pertinent texts thereof are printed in separate Appendix D hereto, pp. A52-A59.

## STATEMENT OF FACTS.

The following facts are uncontroverted except in one instance hereinafter noted.

On April 1, 1965, Petitioner (Gypsum) purchased the assets of a lime plant of United Cement Company, Inc. (United) with specified exceptions including the outstanding collective bargaining agreement dated March 30, 1964, between the United Steelworkers of America, AFL-CIO (Steelworkers) and United which by its terms expired March 30, 1967. The agreement contained, *inter alia*, a check off provision under which United agreed "to check off union dues . . . from the pay of employee who gives written authorization to the Company for such deduction", a grievance procedure ending with an arbitration clause which provided that the "arbitrator shall only have jurisdiction . . . to interpret, apply or determine compliance with the provisions of this agreement" but shall "not have jurisdiction . . . to add to, detract from, or alter in any way the provisions of this contract" and a provision that "the contract may be reopened only for negotiation of a wage increase . . ." for the third year of the contract by notice "in the same manner as that required by law to negotiate for a new contract". Neither the collective bargaining agreement nor the check off authorizations given to United thereunder contained a successorship clause.

United terminated all employees of the plant March 28, 1965. Gypsum started operation of the plant April 5, 1965 at which time or shortly thereafter Gypsum employed all except three former employees of United. Despite the fact that the unexpired collective bargaining agreement had been entered into between the Steelworkers (the International Union) and United to which the Steelworkers' Local 5674 was not a party, an amendment to that agreement had subsequently been entered into in 1964 between that local union and United. The Steelworkers was not a party to this later agreement and Gypsum had

a bona fide doubt whether the local, the Steelworkers, both the local and the Steelworkers, or any union then represented a majority of the employees:[1]

On May 3, 1965, the Steelworkers' business agent requested remittance of April union dues. The plant manager replied, *inter alia*, that United's contract did not bind Gypsum, that Gypsum had no check off authorizations and needed evidence of the Steelworkers' representative status. Without further contact with Gypsum the Steelworkers presented the grievance dated May 17, 1965 here involved. This grievance complained of occurrences subsequent to Gypsum's operation of the plant. It alleged that Gypsum had refused to recognize or deal with the Steelworkers or to comply with the contract[2] and specific alleged violations of the contract not here in issue. The grievance was presented prior to the time when the contract could be reopened and no grievance alleging any violation of the reopening provision of the contract was ever filed. Gypsum answered the grievance by letter dated May 28, 1965 stating, *inter alia*, that the contract was with United that "it has not made dues deductions because it has no authorizations from employees to do so", and that current information was that no union had a majority representation of employees. Without further contact with Gypsum the Steelworkers filed a § 301(a) action (29 U. S. C. § 185 (a)) to compel Gypsum to recognize the contract and arbitrate thereunder.

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1. The Steelworkers contest the statement that Gypsum's doubt was *bona fide*.

2. "1. The Company refuses to recognize and comply with the contract executed March 30, 1964 . . .

"3. The Company has failed and refused to deduct union dues in accordance with Article VI of the contract . . .

"5. The Company has announced that it is not bound by said contract.

"6. The Company has refused to recognize or deal with the duly authorized officers and representatives of the Union."

Gypsum then instituted representation proceedings before the NLRB to determine the unions' representative status (157 NLRB 652 and 161 NLRB 601). The Steelworkers filed, but later withdrew, an unfair labor practice charge that Gypsum had violated § 8(a)(5) of the LMRA (29 U. S. C. § 158(a)(5)). During pendency of these proceedings the District Court entered judgment that the Steelworkers and Gypsum arbitrate the grievance under the contract and Gypsum appealed from this judgment. While the appeal was pending the Board decertified the Steelworkers. The Court of Appeals thereafter affirmed the judgment of the District Court. *United States Gypsum Company* v. *United Steelworkers of America, AFL-CIO*, 384 F. 2d 38 Cert. Den. 389 U. S. 1042 (1972).

In the ensuing arbitration no evidence of the service of a notice to reopen the contract was presented to the arbitrator. Neither party presented evidence or argument to the arbitrator relative to a wage increase that might have been negotiated. In the post hearing brief the Steelworkers requested that the arbitrator "extend the contract for an additional period commensurate with that during which it was rendered ineffective" because of Gypsums' refusal to honor the contract.

The arbitrator held that Gypsum was bound by the collective bargaining agreement and had violated the reopening provision thereof. He awarded a retroactive wage increase to all employees regardless of the period during which they were employed by Gypsum in an amount that he found from the arbitrator's own reference to a BNA Survey of wage increases in 1967 might have been negotiated. No opportunty was afforded for a hearing relative to such increase. The statement of facts in his report quoted Gypsum's letter of May 28, 1965 (*supra*, p. 5) but the arbitrator held that the issues relative to check off authorizations to Gypsum were an "afterthought" and came "too late", "which the Union might readily have overcome had the Company brought them to the Union's attention at the time of the takeover or filing of the grievance" and awarded payment to the

Steelworkers, without right of recoupment from Gypsum's employees, in an amount equivalent to the union dues that might have been checked off to the date of the Steelworkers' decertification.

The Steelworkers instituted a § 301(a) action (29 U. S. C. § 185(a) to enforce the award. The District Court found that the collective bargaining agreement was binding upon Gypsum, but that the wage award had the effect of making a new contract and violated the agreement and national labor policies as explained in *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970). It held that Gypsum's objections to the arbitrator's check off award went to the merits and the award was valid but modified this award because the denial to Gypsum of corresponding deductions from employees' wages would require Gypsum to violate § 302(a) of the LMRA (29 U. S. C. § 186(a)). The District Court then gave the Steelworkers an option to withdraw their union dues demand and take instead a judgment for their attorneys' fees. The Steelworkers elected to take attorneys' fees. Judgment was entered for $8,885.00 on this issue. 339 F. Supp. 302 (1972). The Steelworkers appealed from those parts of the judgment adverse to them and Gypsum cross-appealed. On December 1, 1972 Gypsum sold the assets of the plant with specified exceptions and the Court of Appeals was advised of this fact.

The Court of Appeals held that the arbitrator could hold that the dues check off and wage reopener provisions of United's collective bargaining agreement were binding upon Gypsum, that § 302(a) of the LMRA did not make the arbitrator's check off award unenforceable, affirmed the aspects of the Trial Court's decision enforcing the arbitrator's award, reversed its refusal to enforce the wage reopener award, held that it did not appear that the District Court in awarding attorneys' fees had used the standard that Gypsum exhibited bad faith in refusing to abide by the awards and remanded the case for additional proceedings in accordance with its opinion.

## REASONS FOR ALLOWANCE OF THE WRIT.

### 1. The Decision In This Case Conflicts With the Basic National Labor Policy Underlying the Decision of This Court In NLRB v. Burns International Security Services, Inc. (406 U. S. 272). It Conflicts With the Decisions of This Court That the Subject Matter of § 301(a) of the LMRA Requires Uniform Law.

The Court of Appeals held that the arbitrator could hold, consistent with national labor policy, that Gypsum, a purchaser of the physical assets of the plant of United and subsequent employer of the seller's employees, was bound by the check off and wage reopener provisions of the outstanding collective bargaining agreement negotiated with United, which Gypsum neither agreed to nor assumed. This holding, which underlies its decision enforcing the arbitrator's awards, conflicts with the basic national labor policy underlying the decision of this Court in *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972).

The Court of Appeals based its decision on the rationale of *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964) relative to the role of arbitration in effectuating national labor policy. It recognized the principle applied in *Burns*[3] that basic national labor policy contemplates private bargaining under Labor Board supervision of procedure alone, and does not permit official compulsion over the actual terms of a contract. It acknowledged that this principle could justifiably presage a decision that an arbitrator, operating within the same basic framework of national labor policy as the Board, does not have the power to bind the successor employer to substantive provisions of a collective bargaining agreement to which it is not a party. The Court, nevertheless, held that this basic national labor policy did not preclude the arbitrator from

3. See separate Appendix B, pp. A19-A20.

binding Gypsum to substantive provisions of United's prior existing collective bargaining agreement. It would thus establish a dichotomy by which the obligations of a purchaser of assets of a business, and new employer, under the collective bargaining agreement of the predecessor would turn upon the forum chosen for the complaint. Such a double standard is intolerable.

The arbitration was pursuant to order of the District Court. It was not a voluntary arbitration in which the arbitrator was authorized by the parties in his discretion to make an award. In such an arbitration the arbitrator's award must be governed by the same basic national labor policy which binds the NLRB and principles of law applied by the courts. The mere form of the proceeding should not change this principle (*Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 524, 32 S. Ct. 535, 56 L. Ed. 863 (1912)). As stated by this Court in *Teamsters' Local* v. *Lucas Flour Co.*, 369 U. S. 95, 103, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962), the subject matter of § 301(a) is peculiarly one which calls for uniform law.

The obligations, if any, of the new employer under the contract should be the same whether determined in a proceeding before the Board, before an arbitrator, or in a court of law. *Howard Johnson Company, Inc.* v. *Detroit Local Executive Board, Hotel etc. Int'l. Union*, No. 73-631, ..... U. S. ....., 94 S. Ct. 2236, 41 L. Ed. 2d 46 (1974).

There are also conflicts in the views of the Circuit Courts of Appeal relative to the obligations of a new employer under the rationale of *Wiley*. The Ninth Circuit holds that a purchaser of assets of the predecessor employer is, under circumstances analogous to this case, bound by the entire outstanding collective bargaining agreement of the predecessor. *Wackenhut Corp.* v. *Int'l. Union, United Plant Guards*, 332 F. 2d 954 (9 Cir. 1964). The Fifth Circuit in this case and the Third Circuit in *United Steelworkers of Amer.* v. *Reliance Univ., Inc.*, 335 F. 2d 891 (3 Cir. 1964) hold that it remains for the arbitrator to determine the substantive provisions of the prede-

cessor's collective bargaining agreement that are binding on the purchaser according to the circumstances existing after the purchase. The decision in this case and of the Third Circuit in *Reliance* would in effect permit the arbitrator to make a new contract between the union and the purchaser and conflicts directly with the fundamental principle stated in *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960) that an arbitrator's award is "legitimate only so long as it draws its essence from the collective bargaining agreement".

The decision in this case and of the Third Circuit in *Reliance*, would require a purchaser who sets initial terms of employment at variance with those in the outstanding collective bargaining agreement of the seller, which the purchaser may lawfully do under *Burns* (406 U. S. 272 at 286 & 294), *to incur the risk of* having violated the provisions of the contract that an arbitrator might subsequently determine to be binding upon the purchaser, *an unfair labor practice.*

Acquisition of assets is a common way of acquiring a business and allowance of the Writ in this case will give this Court a vehicle with which to settle the uncertainties now existing under these conflicting decisions.

**2. The Decision In This Case Enforcing the Check Off Award Conflicts in Principle With the Decisions of This Court In H. K. Porter Co. v. NLRB (397 U. S. 99) and In Burns. It Departs from the Contract and Conflicts With Decisions of the Second Circuit Relative to Violations of § 302(a) of the LMRA. The Check Off Award Is Capricious and Arbitrary and Penal In Character.**

The Court of Appeals rejected Gypsum's defense to the check off award as "a veiled attempt to have us pass on the merits of the award" and stated that there was a difference as to the meaning and application of the check off provision of the

contract. Gypsum's position was simply that it had no authorizations from its employees to check off their union dues.

The collective bargaining agreement provided that United would "deduct union dues . . . from the pay of employee *who gives written authorization to the Company for such deduction.*" [Italics added] Absent any such authorizations to Gypsum the arbitrator's check off award does not draw its essence from the agreement. No difference as to the meaning and application of the check off provision in the contract arose before the arbitrator.

The check off award can be sustained only on the assumption that concomitant with Gypsum's obligation to honor the check off provision in the collective bargaining agreement the check off authorizations given to United by its employees became authorizations from these employees to Gypsum after they had been employed by Gypsum. Such an extension of the rationale of *Wiley* would compel Gypsum, through the intervention of an arbitrator in an involuntary arbitration, to check off union dues and conflicts with the fundamental national labor policy of private bargaining without official compulsion over terms of the contract enunciated by this Court in *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970) and in *Burns*.

Section 302(a) of the LMRA (29 U.S.C. § 186(a)) makes it unlawful for an employer to pay money to a labor organization which represents or claims to represent its employees. Payment of union dues without deduction from the wages of the employees is a contribution to the union and violates § 302(a). *NLRB* v. *Jack Smith Beverages*, 202 F. 2d 100, 101-102 (6 Cir. 1953); *T. C. Wagster, d/b/a ABC Machine & Welding Service*, 122 NLRB 944, 945 (1959); *Eastern Missouri Contractors Ass'n.*, 180 NLRB No. 83 pp. 509, 514 (1969). The Court of Appeals held however, that the purpose of § 302(a) is to protect the employer from extortion and insure honest representation of the employees and that this

objection is inapposite. Its decision conflicts with decisions of the Second Circuit that § 302(a) is to be construed broadly and covers situations that do not involve conscious wrongdoing. *United States* v. *Ryan*, 232 F. 2d 481, 483 (2 Cir. 1956); *Int'l. Longshoremen's Ass'n.* v. *Seatrain Lines, Inc.*, 326 F. 2d 916, 920 (2 Cir. 1964); *Moglia* v. *Geoghegan*, 403 F. 2d 110, 115 (2 Cir. 1968).

The Court of Appeals held that § 302(c) (2) excepts an arbitrator's award from the provisions of § 302(a), that the arbitrator's check off award was within the remedial powers of the arbitrator and lawful and reversed that part of the District Court's judgment which held that the arbitrator's denial to Gypsum of the right of recoupment from employees' wages violated § 302(a). Section 302(c) (2), however, contemplates a bona fide award of an arbitrator other than the check off of union dues and the decision of the Court of Appeals in this case conflicts in principle with that of the Second Circuit in *Int'l. Longshoremen's Ass'n.* v. *Seatrain Lines, Inc.*, 326 F. 2d 916, 919 (2 Cir. 1964), holding that § 302(c) (4) provides the exclusive method by which employers may contribute to the general purpose funds of unions. Also, the arbitrator's denial to Gypsum of corresponding deductions from the employees' wages for checked off union dues departs from the contract and is penal in character.

Gypsum's letter of May 28, 1965 replying to the grievance stated that it "has not made dues deductions because it has no authorizations from employees to do so". (*supra*, p. 5) The arbitrator was aware of this defense for he quoted this letter in his report. Despite this fact he rejected this defense as an "afterthought" which "came too late" and stated it could easily have been remedied by the Steelworkers if it had been made at the time of the grievance. Nevertheless the Court of Appeals held this decision was within the jurisdiction of the arbitrator to interpret the contract and that his decision was not capricious or arbitrary. The national labor policy encouraging settlement

of labor disputes through arbitration will be unproductive unless arbitrators are held by the courts to integrity in their findings of fact and sound principles of law.

**3. The Decision In This Case Enforcing the Arbitrator's Wage Increase Award Conflicts With the Basic National Labor Policy of Freedom of Contract Underlying the Decision of This Court In H. K. Porter Co. v. NLRB (397 U. S. 99). It Conflicts In Principle With the Decisions of This Court In Teamsters Local v. Lucas Flour Co. (369 U. S. 95) and Howard Johnson Company, Inc. v. Detroit Local Executive Board, Etc. (94 S. Ct. 2236).**

The reversal by the Court of Appeals of the District Court's refusal to enforce the wage increase award conflicts with the policy of freedom of contract underlying the decision of this Court in *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970). That decision was distinguished by the Court of Appeals as "concerned with the remedial power of the Board".[4] It held the crucial distinction to be that Gypsum refused to bargain, a breach of contract for which the arbitrator could award compensation although he could not order an agreement for the parties or add to the terms of the contract.

Prerequisite to awarding compensation, however, the arbitrator must find that the negotiations would not have resulted in an impasse but in a wage increase. His award thus has the effect of creating a past contractual provision not supported by agreement of the parties and not required by law, a clear departure from the national labor policy of freedom of contract enunciated in *H. K. Porter.*

Although the Court of Appeals treats the wage increase award as damages it was truly a wage increase to Gypsum's employees, regardless of the period during which they were employed by Gypsum. The arbitrator, as found by the District

4. See separate Appendix B, pp. A27-A28.

Court, thus added a new wage scale to the collective bargaining agreement, a matter expressly excluded from his jurisdiction. "Of course, the Union may not use arbitration to acquire new rights . . . any more than it could have used arbitration to negotiate a new contract . . . had the existing contract expired and renewal negotiations broken down." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 555, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964).

The Steelworkers had a remedy for the alleged violation of the reopening clause by Gypsum through a charge of refusal to bargain which they filed with the NLRB but withdrew in the hope of securing a decision that the contract was binding on Gypsum. The Court of Appeals would now give the Steelworkers through the intervention of an involuntary arbitration proceeding a remedy which could not be obtained through the NLRB. *Culinary Alliance & Bartenders U., Local 703* v. *NLRB*, 488 F. 2d 664, 666 (9 Cir. 1973). In other words, the remedy would depend on the forum chosen for the complaint. This conflicts in principle with the decisions of this Court in *Teamsters' Local* v. *Lucas Flour Co.*, 369 U. S. 95, 103, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962) and *Howard Johnson Company, Inc.* v. *Detroit Local Executive Board, etc.*, No. 73-631, ..... U. S. ..... 94 S. Ct. 2236, 41 L. Ed. 2d 46 (1974) which emphasize the need under § 301(a) for uniform law.

A provision for reopening a collective bargaining agreement mid-term for negotiation of wages is common in collective bargaining agreements. Clarification by this Court of the rights and remedies of employers and employees under such a provision would materially assist in the stablization of labor relations nationally.

**4. The Decision In This Case Enforcing the Wage Increase Award Violates Amendment V to the Constitution of the United States. A Possible Wage Increase Was Never Arbitrated. Enforcement of This Award Deprives Gypsum of Due Process of Law.**

The Court of Appeals held that Gypsum's defense to the wage increase award raised a procedural prerequisite and that the arbitrator's decision on that issue was final. It reversed the District Court's refusal to enforce this award.

The time to reopen the contract had not arrived when the grievance was presented. After that time had arrived no grievance was submitted thereon. No evidence of the service of a notice to reopen the contract was presented by the Steelworkers to the arbitrator. No evidence or argument relative to Gypsum's obligation, if any, to grant a wage increase or the amount of a wage increase that might have been negotiated was presented to the arbitrator by either party. No one requested an award of a wage increase. The fact is that the issue of a possible wage increase was never arbitrated and the question of procedural prerequisites to negotiations for a wage increase did not arise before the arbitrator.

Despite the fact that the issue of a possible wage increase was not arbitrated the Court of Appeals further held that there was certainly a difference as to the interpretation of the reopening clause. There was no issue before the arbitrator as to the meaning of the reopening clause. The Steelworkers' post hearing brief requested that the term of the contract be extended by the arbitrator for a period commensurate with the time that Gypsum had refused to honor the same. Gypsum contended that the contract was not binding on it. A wage increase award did not naturally flow from the reopening provision. *Kansas City Luggage & Nov. Wkrs.* v. *Neevel Luggage Mfg. Co.*, 325 F. 2d 992, 993 (8 Cir. 1964). Calling it a matter of contract interpretation does not change the situation. *Radio Corp. of*

*Am.* v. *Association of Scientists & Pro. Eng. P.*, 414 F. 2d 893, 896 (3 Cir. 1969).

The arbitrator decided that the remedy requested by the Steelworkers was not feasible because of the Steelworkers decertification and that the possible wage increase was the remedy. Under the circumstance he should have afforded the parties an opportunity to be heard on the matter. Instead, he arrogated to himself an issue not litigated by the parties in the arbitration and rendered an award in an amount determined on his own research. This award does not satisfy the rudimentary principles of fairness essential to a valid court ordered arbitration and is void for want of due process. *Dewey* v. *Reynolds Metals Company*, 291 F. Supp. 786, 790 (1968), 304 F. Supp. 1166, Rev. 429 F. 2d 324 on other grounds; *J. C. Penney Co.* v. *NLRB*, 384 F. 2d 479, 483 (10 Cir. 1967).

**5. The Decision In This Case Raises Issues of Fundamental Importance to Labor, Business and Industry and Which Are Also Important In the Administration of the LMRA.**

The conflicts between the decision of the Court of Appeals in this case and the decisions of this Court and decisions of other Courts of Appeal and the errors in said decision raise important questions of law which are of concern to a broad segment of labor, business and industry. They are also of importance in the administration of the LMRA.

The extent to which an arbitrator may hold a purchaser of a business bound by the provisions of a collective bargaining agreement negotiated with the seller is a significant factor in nearly every business acquisition in which the seller has a viable collective bargaining agreement, whether the acquisition is by purchase of assets or otherwise. The serious inequities which may arise from holding a new employer bound by substantive provisions of such a collective bargaining agreement, including the inhibiting of transfers of capital, the tying of a union to a disadvantageous contract, the new problems that may arise

for the successor employer relative to replacement of employees, seniority rights, wages, subcontracting practices, fringe benefits, pension rights, and the possible refusal of the union to negotiate changes, have been pointed out by this Court in *Burns* (406 U. S. at 287-90) and emphasize the need for clarification of the conflicting decisions relative to the obligations of a new employer under all or any of the provisions of such a collective bargaining agreement.

The question of whether an arbitrator is bound by the basic framework of national labor policy and the rules of law applied by the courts is important in the administration of the Act. The National Labor Relations Board defers to arbitration only if the proceedings are fair and regular and not repugnant to the purposes and policies of the Act. *Banyard* v. *NLRB*, No. 73-1610, ..... F. 2d ..... (D. C. Cir. Aug. 14 1973). Also if the arbitrator is not so bound employers and labor organizations will be hesitant to include an arbitration provision in their collective bargaining agreements and the role of arbitration in effectuating national labor policy will be lessened.

The questions raised herein relative to the validity of the arbitrator's awards for the check off of union dues and the wage increase under the reopening clause in the predecessor's contract are important to the NLRB as well as to employers, labor organizations and employees, for any violation of a provision of the contract is an unfair labor practice. All of these considerations and others illustrate the urgent need for this Court to settle the existing uncertainties in the law relative to the obligations of a new employer under the collective bargaining agreement negotiated with the predecessor. The importance of these questions is further emphasized by the fact that the Chamber of Commerce of the United States of America has requested that petitioner consent to the granting of its application to this Court for leave to file a brief as amicus curiae in this proceeding.

Of particular importance to the continuance of a free enterprise economy is the need for uniformity in the decisions of the

various authorities having jurisdiction to determine the contractual power of a buyer of assets of a business to specifically exclude from the purchase a viable collective bargaining agreement negotiated with the seller. If such authorities can apply their own law (to paraphrase the words of Daniel Webster) there can be no general permanent law for courts to administer or employers, employees and labor organizations to live under.

## CONCLUSION.

For the reasons hereinbefore stated it is respectfully submitted that the writ of certiorari prayed for herein should be granted.

Respectfully submitted,

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